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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEONARD RALPH WALKER, II,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

Appellant Leonard Ralph Walker, II, was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on December 15, 1965 in case No. 35581-CD [C. T. 2].[1/] The indictment is in two counts and charges violations of Title 50 App., U. S. Code, Section 462, Universal Military Training and Service Act; Failure to Report for Induction, Failure to Report Address.

On January 3, 1966, appellant was arraigned before the

1/ "C. T." refers to Clerk's Transcript of Record.

Honorable E. Avery Crary, United States District Court Judge, and entered a plea of not guilty to the two counts of the indictment. Appellant was represented by counsel at all stages of the proceedings. On January 24, 1966, case No. 3581-CD was called for jury trial before the Honorable Peirson M. Hall, United States District Court Judge. The jury was impaneled and the case was continued to January 25, 1966.

On January 25, 1966 the trial in case No. 35381 commenced before Judge Crary. On January 26, 1966 the jury returned a verdict of guilty as charged on both counts of the indictment. On February 21, 1966 appellant was sentenced to the custody of the Attorney General for a term of three years, the sentences to run concurrently on each of the two counts [C. T. 7]. A timely Notice of Appeal was filed on February 21, 1966 and appellant was released on $500 bond pending appeal [C. T. 8].

Jurisdiction of the trial court was founded upon Title 50 App. U. S. Code Sec. 462 and Title 18, U. S. Code Section 3231. This court has jurisdiction pursuant to Title 28 U. S. Code Section 1291, 1294.

II

STATUTES INVOLVED

Title 50 App., Section 462, United States Code, provides in pertinent part as follows:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both . . . "

Title 50 App., Section 465(b) provides:

"It shall be the duty of every registrant to keep his local board informed as to his current address and change in status. . . . "

III

STATEMENT OF THE FACTS

At the time of the trial of this case the original selective service file of appellant was offered and admitted in evidence as Government's Exhibit No. 1 [R. T. 12, 15].[2/]

This file and testimony of appellant during trial revealed the following events with respect to appellant's registration status in the Selective Service System:

On April 12, 1962, the appellant registered at Local Board No. 116 (hereinafter referred to as the "Board"), Los Angeles, California. Appellant listed his address as 922 Largh Street, Inglewood, California (p. 1).[3/] On November 27, 1963, appellant filed with a draft board in Spokane, Washington, the Current Information Questionnaire. This questionnaire was received by the Board on December 3, 1963 (p. 9).

On March 31, 1964, the Board mailed appellant a Classification Questionnaire. After being forwarded to at least seven different addresses, including appellant's addresses at Inglewood, California, Spokane, Washington, and Anchorage, Alaska, the questionnaire was returned to the Board unopened. On the underside of the envelope an obscene remark was written (pp. 9-18).

On June 8, 1964, the appellant was classified in Class 1-A

2/ "R. T." refers to Reporter's Transcript of Record.

3/ Refers to pages of appellant's Selective Service File, Government's Exhibit #1.

by the Board (p. 16). Thereafter, Form SSS 110, Notice of Classification, was mailed to appellant; however, this was returned to the Board unopened. On February 19, 1965, the Board in an effort to locate appellant, wrote a letter to Mr. Robert Morris, 4817 Alfred Avenue, San Diego requesting information as to the appellant's address. Mr. Morris replied and gave to the Board two different addresses where the appellant might be reached (pp. 24, 25). On March 26, 1965, the Board mailed appellant Form C-85, at a Sacramento, California, address, which address had been given to the Board by Mr. Morris. The letter was returned unopened after first being forwarded to appellant's previous address at Spokane, Washington (pp. 27, 28).

Thereafter, numerous other attempts were made by the Board to contact appellant and obtain his current address (pp. 31-35). On April 16, 1965, appellant was mailed an Order to Report for Armed Forces Physical Examination. This letter was sent to the appellant's previous Spokane, Washington address and then forwarded to appellant's father's address in San Diego, California. The letter was returned unopened (pp. 36-41). On June 21, 1965, the Board sent to appellant an Order to Report for Induction on July 20, 1965, at 9:30 A. M. The letter was returned to the Board unopened (pp. 47-56).

On September 30, 1965, appellant was interviewed by the FBI in San Diego, California. Appellant stated, inter alia, to the agents that he had no knowledge that he was wanted for induction

because all correspondence he received from the Draft Board was sent back by him to the Board unopened. Appellant further stated that if he had had knowledge that he had been called into the service he would not have reported as he would prefer to serve time in the federal penitentiary. Thereafter, on October 28, 1965, appellant was arrested by agents of the FBI in Lake Wohlford, California. At the time of his arrest defendant was using an alias.

IV

QUESTIONS RAISED ON APPEAL

I. Did the trial court err in admitting in evidence the Selective Service File of the appellant?

II. Was there a basis in fact for rejecting the appellant's classification claims?

III. Was the local board required to reopen the classification of appellant and reclassify him after he presented his so-called "new evidence"?

V

ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED IN EVIDENCE APPELLANT'S SELECTIVE SERVICE FILE.

Title 28, United States Code, Section 1733, provides that

records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction, or occurrence as a memorandum of which the same were made or kept.

Major Miller testified that the appellant's selective service file, which he delivered to the court, was in custody of the office which he headed (R. T. 14, 24), and in his custody as Coordinator of the Selective Service System, Southern District of California (R. T. 11, 15).

It is submitted that the introduction of the file into evidence is specifically sanctioned by Section 1733 noted above. Appellant cites Title 28, United States Code, Section 1732 in support of his contention of admissibility, but fails to indicate how Section 1732 applies to this case, or to cite any authority supporting his unique interpretation of this section. It is further suggested that Section 1732 does not apply to the admission of the appellant's Selective Service file.

Contrary to appellant's supposition (Opening Brief, 6-7), the Government did not introduce the original file in the Walker case in order to remedy any supposed inadequacies in earlier trials. The Government is allowed the alternative of introducing in evidence the original file or the certified copy thereof.

This court has previously approved the proposition that a duly authenticated copy of the registrant's selective service file is admissible in a prosecution for violation of Title 50, Appendix, United States Code, Section 462.

Yaich v. United States, 283 F. 2d 613 (9th Cir. 1960);

Kariakin v. United States, 261 F. 2d 263 (9th Cir. 1958);

LaPorte v. United States, 300 F. 2d 878 (9th Cir. 1962);

Olender v. United States, 210 F. 2d 795 (9th Cir. 1954).

See also: United States v. Borisuk, 206 F. 2d 338 (3rd Cir. 1953).

It follows that better evidence -- the original copy, duly authenticated -- would likewise be admissible.

Appellant implies that the only way to properly introduce a registrant's selective service file into evidence is to bring into court each and every individual who has at one time worked on that file, or had the file in his office (Opening Brief, 7-8). Such a procedure would uselessly impede the swift trial of such cases and would conflict with the purpose of Title 28, United States Code, Section 1733.

Wong Wing Foo v. McGrath, 196 F. 2d 120, 123 (9th Cir. 1952).

B. AT THE TIME APPELLANT WAS ORDERED TO REPORT FOR INDUCTION HE WAS PROPERLY CLASSIFIED 1-A.

32 Code of Federal Regulations, Section 1622. 10, provides that every registrant who has failed to establish to the satisfaction

of the local board, subject to appeal, that he is eligible for classification in another class, shall be placed in Class 1-A; "Available for military service."

It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant is considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. 32 Code of Federal Regulations, §1622.1 (c).

It is apparently not argued that appellant's failure to even fill out the classification questionnaire (p. 4) justified any classification other than 1-A. Series VIII of the questionnaire does not reflect a claim to be a conscientious objector, nor does appellant claim any other exemption prior to the time of his induction date (p. 7).

C. EVIDENCE OF APPELLANT'S ATTEMPT TO OBTAIN RECLASSIFICATION AFTER HIS FAILURE TO REPORT FOR INDUCTION IS IRRELEVANT TO THE QUESTION OF WHETHER HIS REFUSAL CONSTITUTED A VIOLATION OF LAW.

The trial court was not required to consider the action of the local board relative to a claim of conscientious objection filed after appellant's failure to report for induction. Evidence of such action had no relevancy as a defense to the criminal conduct charged. Appellant seeks to create the illusion that the

action of the Board violated due process of law with respect to his classification and thereby rendered the order to report for induction illegal. However, the action of the Board was unassailable when considered in view of the evidence it had before it at all times preceding appellant's failure to report for induction.

Without exception, in the cases cited by appellant to support his position, the registrant has made some effort to lay a factual basis for his objection to induction before the time when he was ordered to report. Appellant made no claim as a conscientious objector prior to receiving his notice to appear for induction.

The Board cannot be criticized for acting reasonably upon information available to it. The case should be evaluated on the basis of (1) the local board's action up to the time of induction, and (2) the appellant's behavior in defiance of the local board's action. See Cox v. United States, 332 U. S. 442, 454 (1947).

The probability of claims of exemption arising after the mailing of induction notices was anticipated by regulation. 32 Code of Federal Regulations, Section 1625. 2 provides that the classification of a registrant shall not be reopened after the local board has mailed the registrant an order to report for induction, unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which he has no control. This regulation has been upheld as applying to requests to reopen a claim of conscientious objection.

Wyman v. La Rose, 223 F. 2d 849 (9th Cir. 1955);

Feuer v. United States, 208 F. 2d 719 (9th Cir. 1955); United States v. Biesiada, 247 F. Supp. 599 (S. D. N. Y. 1965).

In Keene v. United States, 266 F. 2d 378, 383-84 (10th Cir. 1959), the court stated:

> "It does not seem unreasonable or derogatory to the spirit and purpose of the exempting statute to provide by regulation that no request for reopening or reclassification shall be entertained after notice to report for induction is mailed. Otherwise the whole machinery of the selective service process may conceivably be disrupted by last minute changes in status for purposes of avoidance. Such is the manifest purpose of the proviso in Regulation 1625. 2. We think the regulations have application to a conscientious objector's claim as all other claims for a change in status. It seems also entirely consistent with the procedural safeguards provided in the selective service process to say that the circumstances relied on to show a change in status must have occurred after the induction notice was mailed."

The evidence submitted at trial clearly shows that appellant's attempt to obtain a conscientious objector classification fell under the provisions of this regulation. Any evidence

purporting to show conscientious objection which was submitted after failure to report for induction -- the principal unlawful act -- is irrelevant and is not entitled to consideration as a defense to the charge.

D. ASSUMING ARGUENDO THAT SUBSEQUENT ACTION BY THE BOARD WAS RELEVANT TO THE ISSUE OF APPELLANT'S GUILT, AND THE TRIAL COURT SHOULD HAVE CONSIDERED THE LEGALITY OF THE LOCAL BOARD'S REFUSAL TO REOPEN APPELLANT'S CLASSIFICATION, THERE WAS NO VIOLATION OF DUE PROCESS OF LAW.

On June 18, 1965 appellant was mailed a delinquency notice for failure to report for his armed forces physical (p. 38). On June 21, 1965 appellant was mailed an order to report for induction (p. 44). On October 1, 1965 appellant wrote his local board, noting that he had been contacted by the F. B. I. and claiming that he had never received an induction notice (p. 57). On October 5, and again on October 25, appellant wrote the local board asking for selective service form for conscientious objector (pp. 59, 62).

Appellant contends that the local board abused its discretion in declining to reopen his classification and thereby depriving him of appellate review of his classification. There is no quarrel with the principle that arbitrary and capricious action by a local board in refusing to reopen a classification constitutes a violation of due process of law and is action in excess of its jurisdiction.

However, appellant's local board did not act in such a manner. The cases cited by appellant are readily distinguishable from his fact situation. The two unreported District Court cases are of little help, for appellant gives no outline of pertinent facts, but only supplies the court's legal conclusions (Opening Brief, 16-17).

Appellant offers no authority for his contention that a regis- has the right to have his case reopened -- with accompanying appellate opportunities -- when no new circumstances beyond his control are presented to the board.

MacMurray v. United States, 330 F. 2d 928 (9th Cir. 1965), which appellant cites as authority for his contention that the local board should have reopened his case, deals with a defendant who appealed his 1-O classification and was refused a hearing by the Justice Department. The court dealt with the refusal noting that on appeal the registrant had a right to such a hearing. It is true that in MacMurray, after the Justice Department returned the registrant's file to his local board, that Board refused to reopen the file, but such action was not an issue in the court's decision. Clearly the MacMurray case deals with a set of facts not analogous to appellant's situation.

Appellant also cites Stain v. United States, 235 F. 2d 339 (9th Cir. 1956), as his other Ninth Circuit authority. In Stain the local board refused to reopen registrant's file after his armed forces physical, but before he was notified to report for induction. There was substantial evidence that the registrant did not know of tje 1-O classification, that he was of unusually low mentality, and

that the local board incorrectly thought it was required to keep registrant's file closed after he had taken his physical examination. As in MacMurray, the decision in Stain is based on particularly dissimilar facts from those in appellant's case.

The local board shall not reopen a registrant's classification when, upon a registrant's written request to reopen and consider his classification, the facts presented would not in the opinion of the board justify a change in classification. 32 Code of Federal Regulations, Section 1925. 4.

The classification of a registrant shall not be reopened after the Board has mailed the registrant an order to report for induction unless the Board first specifically finds there has been a change in registrant's status resulting from circumstances over which he has no control. 32 Code of Federal Regulations, Section 1625. 2.

There was no evidence of a change in appellant's status before the Board at the time it reviewed the "new facts" presented by him. Appellant has the burden to establish his right to an exemption. Fleming v. United States, 344 F. 2d 912 (10th Cir. 1965). It is submitted that it is also incumbent upon the registrant to present evidence of a change in status resulting from circumstances over which he has no control if he seeks to have his classification reopened after mailing of the order to report for induction.

Appellant's Special Form for Conscientious Objector fails under the most careful scrutiny to reveal anything suggesting a

change in status. It does indicate the presence of an unarticulated attitude which has, according to appellant, existed for a number of years. Absent any change of status resulting from circumstances beyond appellant's control, the Board cannot reopen his classification. It is submitted that appellant's case is controlled by this court's previous ruling in Boyd v. United States, 269 F. 2d 607 (9th Cir. 1959), which involves a tardy claim of conscientious objection and refusal to reopen classification. See also United States v. Monroe, 150 F. Supp. 785 (S. D. Cal. 1957).

If it is found there was evidence supporting a specific finding of change of appellant's status beyond his control, the question remains whether the Board acted in excess of its jurisdiction in concluding that the facts presented by the appellant did not warrant reopening or reclassification.

The question of jurisdiction is reached only if there is no basis in fact for the Board's opinion and for continuing appellant in Class 1-A.

Estep v. United States, 327 U. S. 114 (1946).

The task of the courts is to search the record for some affirmative evidence to support the local board's finding, and the courts may properly insist there be some proof that is incompatible with the registrant's proof of exempt status. His own admissions may be considered by the Board as a basis for an inference as to appellant's sincerity and as to qualification of his professed conscientious objection in terms of statutory requirements.

Dickinson v. United States, 346 U.S. 389, 398-97 (1953);

Witmer v. United States, 348 U.S. 375 (1955).

Therefore, if the review of the record before the Board indicates any basis in fact for the Board's conclusion that appellant's professed belief failed to meet the test of United States v. Seeger, 380 U.S. 163 (1964), i.e., that it was a sincere and meaningful belief which occupied in the appellant's life a place parallel to God of those admittedly qualifying for the exemption, judicial inquiry is at an end and the decision of the Board must be considered as having been made in conformity with applicable regulations and such decision is final, even though it may have been erroneous.

Estep v. United States, supra, 122-23.

A serious question as to appellant's sincerity is raised by his conduct in failing to report his change of address to his local board, scrawling an obscenity on the envelope containing his selective service form (p. 13), and in returning all selective service mail unopened (p. 57; R.T. 27.14, 57-61).

The fact that he made no effort to establish his claim until after failing to report for induction suggests that he resorted to the expedient of filing a conscientious objector claim to evade military service and criminal penalty.

There is sufficient evidence in appellant's claim to form a basis for the inference that appellant's beliefs were actually

rationalized, intellectual in their origin, and moral in their fundamental significance. Religious training and belief, in the context of conscientious objection entitling a registrant to exemption from military service, excludes essentially political, sociological, or philosophical views or a merely personal moral code. Title 50, Appendix, U. S. Code, Section 462.

Taking all these factors into consideration, it is apparent that the local Board had a basis in fact for its opinion; that the facts presented did not warrant reopening or reclassification. It is submitted, therefore, that the action of the board was not a violation of due process of law.

E. NOTWITHSTANDING THE COURT'S DECISION ON COUNT ONE, APPELLANT WAS PROPERLY CONVICTED ON COUNT TWO OF THE INDICTMENT.

It should be noted that appellant's opening brief fails to mention the conviction and three-year sentence on Count Two of the indictment for failure to keep the local board advised of his address.

Appellant's failure to challenge the conviction on Count Two implicitly acknowledges the validity of this conviction and renders this appeal ineffective since appellant was convicted and sentenced to concurrent three-year sentences.

Therefore this appeal is frivolous since the sentence imposed in Count One is concurrent with the sentence imposed in

Count Two and appellant fails to challenge the validity of the conviction on Count Two of the indictment.

Mishan v. United States, 345 F. 2d 790 (5th Cir. 1965).

VI

CONCLUSION

For the reasons stated, the decision of the trial court should be affirmed.

Respectfully submitted,

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Chief, Criminal Division,
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez

GABRIEL A. GUTIERREZ